TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1927

No. [redacted] 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED, APPELLANT,

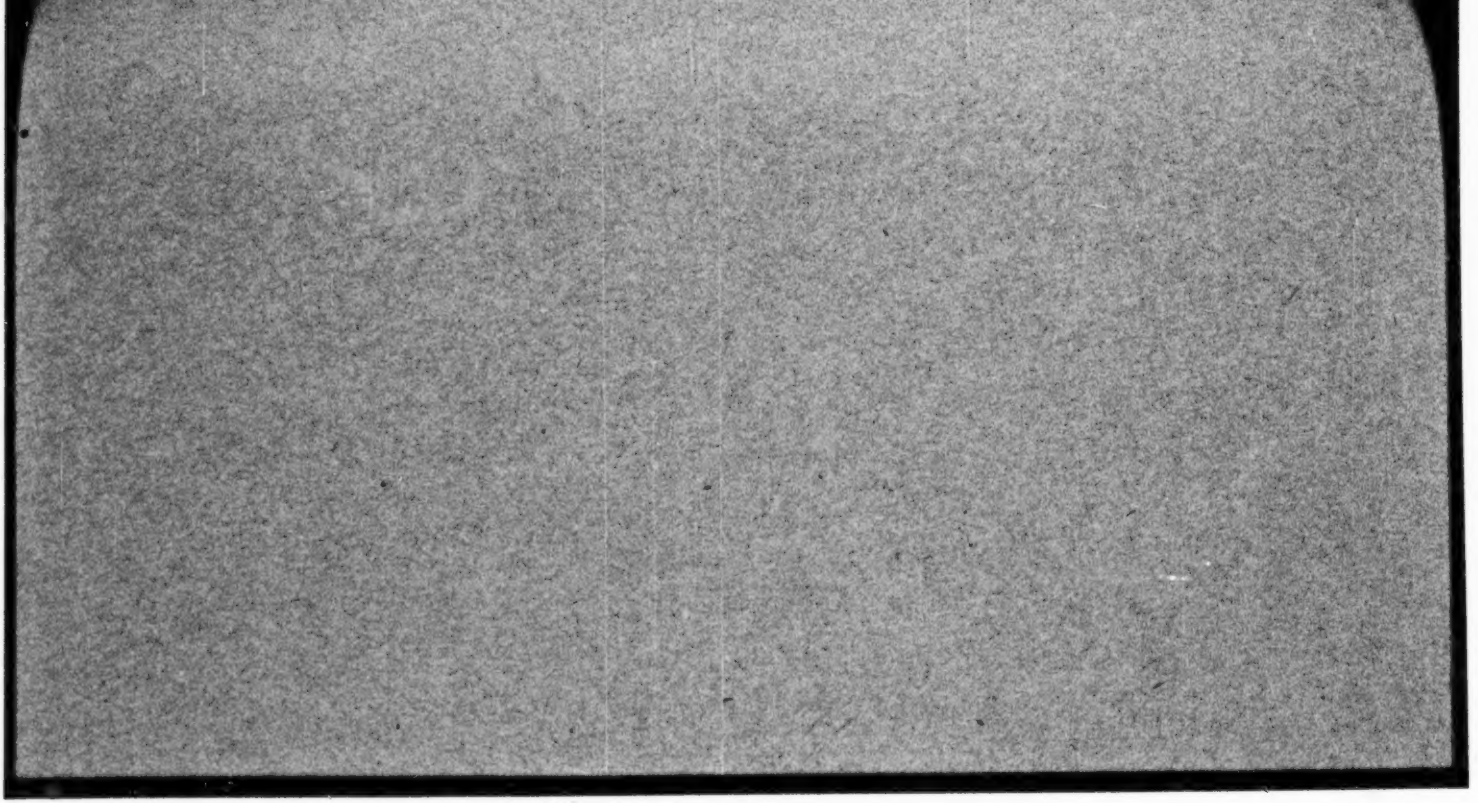
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 3, 1927

(31,245)



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No. 522

WILLIAM C. ATWATER & COMPANY, INCORPORATED, APPELLANT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. D–832

WILLIAM C. ATWATER & COMPANY, INCORPORATED

vs.

THE UNITED STATES

I. MINUTE ENTRIES

On October 29, 1924, the plaintiff filed its original petition.

On November 18, 1924, by leave of court, the plaintiff filed its Amended Petition.

Said amended petition is as follows:

II. AMENDED PETITION—Filed Nov. 18, 1924

To the Honorable Justices of the United States Court of Claims:

William C. Atwater & Company, Inc., files this its amended petition and respectfully represents:

For a First Cause of Action

1. That it is, and at all times hereinafter mentioned was, a corporation created by and existing under and by virtue of the Laws of the State of New York, having its principal office or place of business at No. 1 Broadway, New York City, New York, and operating branch offices in Boston, Norfolk, Cleveland, Bluefield, London and elsewhere, engaged in the business of shipping Pocahontas Smokeless Coal and Coke; that it has at all times, through its officers and agents, borne true allegiance to the United States of America, and has not in any way voluntarily aided, abetted or given encourage-[fol. 2] ment to rebellion against the said Government; and that it is the sole owner of the claim hereinafter presented, never having sold or assigned the same, or any part thereof or any interest therein to any person.

2. That in the month of June, 1917, an unincorporated association of shippers of bituminous coal to the tide-water ports of Hampton Roads, Baltimore, Philadelphia and New York, was organized and known as the Tidewater Coal Exchange, the general purpose of which association was to expedite the transshipment of coal from cars to boats at the above mentioned ports and thus release rolling stock which would be made available to move a larger amount of coal; that the organizers of the Exchange adopted rules for its management and operation on June 20th, 1917, a true copy whereof is hereunto annexed marked "Exhibit B" and made a part hereof.

3. That on or about the 6th day of November, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated August 23rd, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10th, 1917, issued an order, a true copy whereof is hereunto annexed marked "Exhibit A" and made a part hereof.

4. That the order aforesaid adopted and approved the rules of the Tidewater Coal Exchange and made the same a part of said order and a copy of said rules was annexed to said order and therein referred to; and by said order Rembrandt Peale, Commissioner of said Tidewater Coal Exchange, was designated and appointed as the representative of the said Fuel Administrator to carry out the provisions thereof.

[fol. 3] 5. That by the terms of said order every shipper of bituminous coal for transshipment at the ports of Hampton Roads, Baltimore, Philadelphia and New York, or any one of the ports near or usually considered as tributary to said ports, was required on and after November 11th, 1917, to consign all such shipments of coal to said Tidewater Coal Exchange in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein, as under the terms of said rules applied to members of said Tidewater Coal Exchange, and said order further provided that no change should be made in said rules and no additional rules should be adopted affecting shippers subject to said order without first receiving the approval of said United States Fuel Administrator, so long as said order was in effect, which order was in full force and effect at the time and times hereinafter mentioned.

6. That under and by virtue of the terms of said order and the rules of the Tidewater Coal Exchange, the defendant, acting through said United States Fuel Administrator, its duly authorized representative, represented and agreed that any and all coal shipped by any shipper of coal subject to said order should be credited to said shipper in accordance with the rules of the Tidewater Coal Exchange aforesaid.

7. That the order of the Fuel Administrator aforesaid and the rules of the Tidewater Coal Exchange provided that all bituminous coal shipped to tidewater ports should be pooled with other Tidewater coal shipments of the same classification to said ports, and that each shipper should be credited in the pools to which he had made [fol. 4] shipments with an amount of coal equivalent to the amount theretofore shipped by him, and such was the custom and usage established and in effect at all the times when said rules were in force.

8. That at divers times subsequent to November 11th, 1917, and prior to December 5th, 1918, your claimant was a shipper of coal subject to the terms of the order aforesaid hereunto annexed marked "Exhibit A," and in accordance with the terms of said order and the rules of the Tidewater Coal Exchange approved and adopted thereby, your claimant shipped certain bituminous coal consigned to said Tidewater Coal Exchange.

9. That at divers times subsequent to November 11th, 1917, and prior to December 5th, 1918, the defendant, acting through said United States Fuel Administrator, its duly authorized representative, withheld from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange as aforesaid to the aggregate amount of 34,143 net tons, which your claimant was ready, able and willing to receive at the time and times when your claimant was entitled to credit therefor under said order, and did not credit your claimant therewith until December 5th, 1918, on which date said Fuel Administrator increased the amount of your claimant's coal credits by the said 34,143 net tons, as follows:

Pool No. 1	7,824	net tons.
Pool No. 2	24,069	" "
Pool No. 6	2,375	" "
Total	34,268	" "
Less reduction in Pool No. 3	125	" "
Net increased credits	34,143	" "

[fol. 5] 10. That during the period subsequent to November 11th, 1917, and prior to December 5th, 1918, there was a ready and constant demand and market for said coal for export to foreign countries and for bunkering purposes at Lambert's Point, Hampton Roads, Virginia, where said coal was shipped by your claimant as aforesaid, and said coal was then and there being continuously sold in large quantities, and your claimant avers that said demand would readily have absorbed all the coal for which your claimant was entitled to credit under the order of the United States Fuel Administrator and the rules of the Tidewater Coal Exchange aforesaid.

11. That during the period subsequent to November 11th, 1917, and prior to December 5th, 1918, the market price of coal shipped for export from Lambert's Point, Virginia, ranged from $3.80 to $4.20 per net ton at the mines and that said price was the fair and reasonable value of the coal which said Fuel Administrator withheld and failed to credit to your claimant as aforesaid.

12. That about 26,444 net tons of the coal withheld from your claimant and which your claimant did not receive credit for as aforesaid was in tonnage of Pool No. 2 coal and Pool No. 6 coal, for which there was practically no market whatever in quantity after December

5th, 1918, and that your claimant sold said 26,444 net tons subsequent to the time when said tonnage was credited to it at the highest obtainable prices ranging from $2.35 to $2.75 per net ton at the mines.

13. Your claimant avers that its claim is founded upon the Fifth Amendment to the Constitution of the United States, and jurisdiction thereof is vested in this Court by the provisions of the Judicial Code, Section 145.

14. That by reason of the facts aforesaid your claimant has been [fol. 6] damaged in the sum of Fifty Thousand Dollars ($50,000).

15. Claimant avers that it is entitled to compensation at the rate of six per centum (6%) per annum upon the amount of damages aforesaid, to wit, Fifty Thousand Dollars ($50,000), from the 5th day of December, 1918, and that said rate of six per centum (6%) per annum is the fair and reasonable value for the use of money during the period covered by this claim, and at all times thereafter, up to and including the present time.

For a Second Cause of Action

16. Claimant repeats and realleges each and every allegation in paragraphs 1 to 12 inclusive, 14 and 15 herein contained.

17. Your claimant avers that its claim is founded upon an implied contract and jurisdiction thereof is vested in this Court by the provisions of the Judicial Code, Section 145.

Wherefore, claimant demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000), together with just compensation as aforesaid.

William C. Atwater & Company, Inc., by John L. Steinbugler, Secretary.

[fol. 7] Sworn to by John L. Steinbugler. Jurat omitted in printing.

[fol. 8] Exhibit A to Petition

Order relative to tidewater transshipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York and for the employment of and co-operation with the Tidewater Coal Exchange, so called, as a common agency to facilitate such transshipment and to reduce delays in the use of coal cars and coal-carrying vessels.

United States Fuel Administration

Washington, D. C., November 6, 1917.

It appearing to the United States Fuel Administrator that the production of coal intended for transshipment at the tidewater

ports of Hampton Roads, Baltimore,, Philadelphia and New York and ports near or usually considered as tributary to said ports is being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival and return of such vessels and cars at and from such ports are congested and delayed, and that the shipment of coal from such ports is reduced in quantity, and that the distribution of coal to consumers in the territory tributary to the ports to which such coal is destined is less efficient, prompt and reasonable than is necessary for the efficient prosecution of the war, and that delay is occasioned in the delivery of coal for vessels of the navy and transports of the army, by reason of the continuance of individual shipments of coal by various producers upon the lines of coal-carrying roads having terminal at the ports aforesaid, and of individual and distinct transshipments of such coal at such ports only to coal-carrying vessels specially chartered or designated for the transshipment thereat of such individual [fol. 9] shipments, and that the objectionable conditions aforesaid can be largely eliminated and the production, shipment and distribution of coal from said ports both for the army and navy and for consumers in the territories aforesaid can be hastened and improved by the employment of and co-operation with a common agency at each transshipment point in the manner and with the powers hereinafter provided, and that such employment of and co-operation with a common agency is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, and to assure an adequate supply and equitable distribution and to facilitate the movement, and to prevent locally or generally scarcity, of coal.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that, until further or other order of the United States Fuel Administrator and subject to modification hereafter by him at any time and from time to time, the following rules are established for the regulation, to the extent hereinafter provided, of the method of production, sale, shipment, distribution, apportionment and storage of bituminous coal for transshipment at the ports aforesaid:

(1) Every shipper of bituminous coal for transshipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York and ports near or usually considered as tributary to said ports, shall on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange so called, (of which [fol. 10] Rembrandt Peale is the Commissioner. Such shipments and consignments shall be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the trans-

shipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange, but no such shipper subject to this order shall be required by reason of anything herein to become a member of said Tidewater Coal Exchange. A copy of said rules is annexed to this order and hereby referred to. Wherever said rules refer or mention a "member" or "members" of said Tidewater Coal Exchange, said terms shall with respect to this order and shippers subject hereto be deemed to mean a shipper or shippers of coal who are subject to this order; and wherever the "effective date" of the Exchange or of said rules is referred to therein, such reference shall be deemed, with respect hereto and to the shippers subject hereto, to refer to the effective date of this order.

(2) Bituminous coal consigned under the provisions of this order shall be graded and classified in accordance with "Exhibit B" Consigning Pool Numbers, referred to in said rules of the Tidewater Coal Exchange, as modified, cancelled or superseded by the provisions of Classification C, dated July 15, 1917, Classification D, dated July 17, 1917, Classification E, dated July 19, 1917, and Classification F, dated July 27, 1917, and in accordance with the provisions of said Classifications C to F, inclusive, wherever applicable, copies of which and of said "Exhibit B" are on file with this order in the office of the United States Fuel Administrator for inspection by any shipper subject hereto. Changes in said classification shall not be [fol. 11] made against the objection of any shipper subject hereto, except after approval of such changes by the United States Fuel Administrator. Upon application from any shipper subject hereto, the representative of the United States Fuel Administrator appointed under the provisions of paragraph (3) of this order is directed to furnish copies of said "Exhibit B" and said Classification C to F to such shipper.

(3) Said Rembrandt Peale, Commissioner of said Tidewater Exchange, is hereby designated and appointed as the representative of the Fuel Administrator to carry out the provisions of this order, with power to appoint deputies representing him as such representative of the United States Fuel Administrator at any one or all of the ports aforesaid; and in case of any disagreement or controversy between any shipper subject to the provisions hereof, and said commissioner with respect to any shipment or transshipment of coal or other matter arising under this order, or if any decision under rule No. 15 of the said Tidewater Coal Exchange rules hereto annexed, which would be final as to any member of said Exchange, is unsatisfactory to any shipper subject to the provisions hereof, such shipper may appeal to the United States Fuel Administrator.

(4) No change shall be made in said rules of the Tidewater Coal Exchange above referred to, a copy of which is annexed to this order and no additional rules shall be adopted affecting shippers subject to this order, without first receiving the approval of the United States Fuel Administrator.

(5) No change shall be made in the membership of the Executive Committee of said Tidewater Exchange, except with the approval of the United States Fuel Administrator as long as this order is in effect.

[fol. 12] (6) Any shipper subject to the provisions of this order may at any time apply to the United States Fuel Administrator for suspension or termination of the order upon the ground that its continuance is no longer essential to the national security and defense and for the successful prosecution of the war in which the United States is at present engaged.

(7) A copy hereof shall be served upon each of the railroad or railway companies and upon each of the producers of bituminous coal named in the list marked "Exhibit I to the Tidewater Coal Exchange Transshipment Order of the United States Fuel Administrator dated November 6, 1917."

(Signed) H. A. Garfield, United States Fuel Administrator.

[fol. 13] EXHIBIT B TO PETITION

Tidewater Coal Exchange Rules

1. All bituminous coal for transshipment at tidewater ports shall be graded as to kinds and classified as to designated consigning pools under the direction of the Executive Committee elected at the meeting of bituminous coal shippers held in Philadelphia on June 4th, 1917. The grades and classifications to conform to Exhibit B, which shows the pool numbers authorized by the Executive Committee. The Executive Committee may, after due hearing, amend the rules.

Any tidewater coal shipper or consigner may become a member of the Exchange upon furnishing references which will meet with the approval of the Executive Committee; and by subscribing to agreements providing for the handling of his (or its) coal in conformity with regulations governing the exchange of tidewater coal.

2. Shipping instructions and railroad way-bills (revenue and memorandum) shall give the Tidewater Coal Exchange as the consignee; shall show the proper pool number as per Exhibit B, and for whose account shipped. Example: "Tidewater Coal Exchange, Pool 30, account Westmoreland Coal Company."

3. Each member of the Exchange shall provide that each mine operator shipping bituminous coal for his account to the Exchange shall prepare and forward daily by United States mail to the Exchange office at destination port a report on Form 1, showing the initials and number of all cars shipped, with necessary details.

4. Members shall report to the Exchange office at destination port daily at a designated hour the names of the vessels which they have

[fol. 14] chartered for loading for their accounts with the tonnage and pool number of the coal to be loaded into each and the probable arriving time of the vessels at the coal pier. If the vessel is loaded, the commodity should be given.

5. Carriers will send to the Exchange office at destination port, daily, report on Form 2, or copies of scale sheets, showing weight and other information in connection with shipments, and will also report corrections in billing involving weights.

6. Carriers will send to the Exchange office at destination port, weekly, report on Form 3, showing reconsignment of shipments from or to the Exchange.

7. Carriers will report daily, except Sundays and holidays, to the Exchange office at destination port, on Form 4, the number of cars of each pool number at the port and en route, and the approximate time of arrival in twenty-four-hour periods.

8. The Exchange shall issue to each carrier a daily report or reports showing the conditions at each of its tidewater terminals, which reports shall be made on Bulletin Form 7, showing the number of tons of coal reported shipped to date, unloaded into vessels to date, and the standing of each member in each designated consigning pool. This bulletin shall be accompanied by vessel situation report on Form 8. The Exchange shall likewise report daily to each member thereof on Form 9 the tonnage added to or deducted from his account.

9. The assignment of coal to members shall be authorized by the Exchange and no assignment shall be made in excess of the tonnage which such member or members have in the designated consigning pool.

No member shall be entitled to any coal from a designated consigning pool when the accounts indicate that the member has over-[fol. 15] drawn from that pool, unless due to some extraordinary conditions the Commissioner may deem an exception advisable.

This shall not prevent a member from borrowing coal in the pool from any other member having a credit, but such transactions must be between the individual members and authorized by them to the Commissioner in writing.

10. When differences between the tonnage of coal shipped by a member and the tonnage of coal dumped into vessels for his account exist and the differences cannot be adjusted either by additional shipments or exchange of coal, the Executive Committee shall name a price to the Commissioner of the Exchange for the tonnage involved, and the Commissioner shall authorize such debits or credits as may be necessary to properly adjust the differences.

11. In some instances coal originating in different fields will be shipped to tidewater ports under one pool number but under different transportation rates. Adjustments between members of the Exchange

handling the cargo or bunker coal necessitated by such differences shall be made under the direction of the Commissioner.

12. The account of a member in one designated consigning pool shall not have any bearing on his account in another pool at the same port or other ports. Members, however, shall be permitted to offset overdrafts of one pool with shipments made to the same pool at another port subject to the approval of the Commissioner.

13. Failure of a member to provide vessels in which to transport coal from any port shall constitute the basis for the issuance of embargoes prohibiting the forwarding of shipments of coal from mines [fol. 16] for his account. No one who has been so embargoed shall be permitted to ship coal to any designated consigning pool until he has given satisfactory evidence to the Commissioner that he has made proper arrangements for vessels.

14. The Exchange shall sign the average demurrage agreement with each carrier at each port. In the application of car demurrage rules each carrier shall treat each port at which cargo or vessel fuel coal may be unloaded from cars to vessels, separately; and shall include all coal unloaded from cars into vessels in one demurrage account.

Each carrier shall render bill against the Exchange at the close of each calendar month covering all demurrage accruing during the month, and upon receipt of this bill the Commissioner will collect from each member his proportion on the basis of his tonnage loaded by the carrier assessing the demurrage into vessels registering during the calendar month within which the said demurrage charges accrued, and pay each carrier the amount due.

15. In the event of controversies with reference to the operation of the Exchange which cannot be adjusted by the Commissioner, they will be submitted to the Executive Committee and the proper Railroad Committee in joint session and their decision shall be final.

16. The Commissioner of the Tidewater Coal Exchange must be in position at all times to give prompt orders to the agents of the carriers to move from their respective tracks to the vessels, cargo or vessel fuel coal consigned to the "Tidewater Coal Exchange," as soon as vessels are ready for loading. In order to properly protect the charges of the carriers, it will be necessary for all consignees, members of the Tidewater Coal Exchange, to file with the carriers orders to make deliveries on the written instructions of the Commissioner [fol. 17] or his authorized representative; and in order to expedite these movements, consignees must furnish a blanket order prepared on Exchange Form "B" as follows:

"Until further notice you are hereby authorized to accept from the Commissioner of the Tidewater Coal Exchange, or his Deputy, his written orders to deliver to any vessel any coal for tidewater shipment or vessel fuel received at —— Station, consigned to Tidewater Coal Exchange, for account of the undersigned."

Members of the Exchange, on whose account a vessel is loaded with cargo or vessel fuel coal, shall be responsible to the railroad for the freight charges (when billed collect) and vessel loading charges on all cars of coal unloaded into the vessel.

Members shall sign an agreement on Exchange Form "C" to the effect that they will be responsible for, and pay all freight charges (when way-billed collect), and vessel loading charges and assigned proportion of any demurrage charges on all cars unloaded into vessels for their account, this agreement reading as follows:

"I (or we) hereby agree to pay all freight charges, when way-billed collect, loading charges and car demurrage charges assigned against me (or us) by authority of the Commissioner of the Tidewater Coal Exchange on coal shipments going into vessels for my (or our) account at any tidewater port under the Tidewater Coal Exchange Agreement, whether shipped from mines or obtained elsewhere for my (or our) account or for the account of any other member of the Exchange."

17. Each carrier must send to the Commissioner as soon as practicable after the close of each month, a statement showing the gross freight revenue derived from the transportation of tidewater cargo and bunker coal consigned to each tidewater port, to form the basis [fol. 18] of apportionment of the monthly expenses of the Exchange.

18. The Commissioner of the Exchange and his Deputies shall maintain such records as will be required to show disposition made of each car of tidewater coal shipped and to compile statistics which will indicate the average time per car per trip of all cars used for transportation at tidewater coal, and the average detention per car at each tidewater port.

19. Tidewater coal shippers and consignees must execute agreements of the Forms referred to in Regulation 16 and file one copy of each with the Commissioner and one copy of each with the proper officer of the interested carrier, before they begin shipment of tidewater coal to the Exchange.

20. The Executive Committee, Commissioner, and Deputy Commissioners shall at all times protect the quality of coal shipped into the pool through a system of inspection, and analysis if necessary in their opinion, and may at any time suspend shipments by any shipper when in their judgment the quality or preparation is below the proper standard.

21. The coal for transshipment on hand at tidewater ports or en route to such ports upon the effective date of the Exchange shall be disposed of as follows:

(a) Each carrier shall make an inventory on Form 1 of the tidewater coal on hand at each port as of 7 A. M. of the effective date, and under the direction of the Deputy Commissioner shall assign each shipment to the proper designated consigning pool.

(b) Coal shipments which arrive at tidewater ports subsequent to 7 A. M. of the effective date of the Exchange which were shipped [fols. 19 & 20] prior to that date shall be assigned to the proper pools in the same manner as provided in paragraph (a) of this rule.

(c) Agents at stations at which tidewater coal is billed should be instructed to bill in accordance with rules of the Exchange as of the effective date of the Exchange and on that date begin daily report as provided in Rule 4.

22. Joint meetings of the Executive Committee of the Tidewater Coal Shippers and the Railroad Committee shall be held monthly, special meetings to be held subject to the call of the Commissioner.

23. The effective date of the pooling rules and classifications of the Tidewater Coal Exchange will be different at the four ports. It will be as soon as practicable after July 1st, 1917, and proper announcement will be made by the Commissioner.

[fol. 21] III. Demurrer to Amended Petition—Filed December 30, 1924

Comes now the United States by its Attorney General and demurs to the Amended Petition filed in the above-entitled case on November 18, 1924, upon the ground that the facts alleged in said petition do not constitute a cause of action against the United States within the jurisdiction of this Court.

Robert H. Lovett, Assistant Attorney General. Howard J. Bloomer, Special Assistant to the Attorney General.

IV. Argument and Submission of Demurrer

On January 26, 1925, the demurrer in this case was argued and submitted by Mr. Howard J. Bloomer, for the defendant, and by Messrs. Carroll B. Low and John L. Steinbugler, for the plaintiff.

[fol. 22] V. Opinion—February 9, 1925.

Campbell, Ch. J.

Campbell, Chief Justice, delivered the opinion of the court.

The Government has demurred to the petition. Its averments are that plaintiff was engaged in the business of shipping Pocahontas smokeless coal and coke when, in November, 1917, the United States Fuel Administrator, acting under Executive order (a copy of which marked "Exhibit A" is attached to the petition) ordered plaintiff and other shippers of coal for transshipment at the ports of

Hampton Roads and others to consign all such shipments to the Tidewater Coal Exchange. This Tidewater Coal Exchange is alleged to be an unincorporated association of shippers of bituminous coal whose general purpose was to expedite the transshipment of coal from cars to boats at the named ports "and thus release rolling stock which would be made available" for moving more coal. The exchange had a system of rules (made an exhibit to the petition as Exhibit B) which provided for shipments to the exchange as consignee, and daily reports by the exchange showing the number of tons of coal reported shipped to date, amount unloaded into vessels "and the standing of each member in each designated consigning pool." The plaintiff was not a member of the exchange, but under the Fuel Administrator's order its rights were substantially those of a member. It did make shipments of coal consigned to the exchange, and it avers that the defendant, acting through the Fuel Administrator, "withheld from and failed to credit" plaintiff with coal shipped to the said exchange to a large amount, more than 34,000 tons, and failed to give plaintiff the proper credit until December 5, 1918. It is averred that during the period from November 11, 1917, to December 5, 1918, there was a ready market for the coal for export and for bunkering purposes at Lambert's Point, Hampton Roads, Virginia, to which place plaintiff made its shipments; and that the plaintiff would have disposed of its coal at a good price if proper credit for it had been given by the exchange, and on account of the failure to get the requisite notice and credit [fol. 23] plaintiff was subjected to damage stated at $50,000 brought about by the want of a market for coal when the error was discovered.

The petition founds the claim "upon the fifth amendment to the Constitution" and also upon section 145 of the Judicial Code.

If the theory of plaintiff is that there was a taking of its coal by the United States or under their authority it would yet be true that the right to bring suit in this court would not be founded upon the fifth amendment, but upon the existence of an implied contract entered into by the United States. See United States v. North American Co., 253 U. S. 330, 335; Klebe case, 263 U. S. 188, 191; 57 C. Cls. 160. The question, therefore, is whether there was an implied contract on the part of the Government to pay plaintiff's alleged damages or to pay for its coal shipped, as stated, but for which it was not given timely credit by the Tidewater Coal Exchange. While it is to be conceded that where the Government takes property of the citizen for public use without any claim of ownership or right to it in itself it impliedly promises to make just compensation therefor (Great Falls Mfg. Co. case, 112 U. S. 645; North American Co. case, 253 U. S. 330, 335), the circumstances may be such as to clearly rebut the existence of an implied contract. Horstmann & Co. case, 257 U. S. 138, 146; Klebe case, 263 U. S. 188, 191. It is not contended for plaintiff that the coal was requisitioned by the Fuel Administrator under section 10 of the Lever Act, 40 Stat. 276. That section confers power on the district courts to determine the controversies growing out of such a requisition. See Pfitsch case, 256 U. S. 549. We think there was no requisi-

tioning of the coal under that section or any other section of the Lever Act, nor was there any taking of plaintiff's property for public use. See Pine Hill Coal Co. case, 259 U. S. 191, 55 C. Cls. 433; Morrisdale Coal Co. case, 259 U. S. 188, 55 C. Cls. 310. The facts averred clearly rebut any implication of a contract by the United States to pay for the coal. In its essence the suit of plaintiff is one to recover damages for the omission, or negligence, of the Tidewater Coal Exchange as a designated agency of the Fuel Administration. The Government is not liable for the torts, misconduct, misfeasance, or laches of its employees. See Bigby case, 188 U. S. 400, 407; Gibbons case, 8 Wall. 269, 274; Hill case, 149 U. S. 593, 598.

The demurrer should be sustained and the petition dismissed, and it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 24] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 9th day of February, A. D., 1925, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, as amended. On consideration whereof the court is of opinion that the demurrer is well taken. It is therefore adjudged and ordered that the defendant's demurrer be sustained and that the plaintiff's petition, as amended, be and the same is hereby dismissed.

By the Court.

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On April 10, 1925, the plaintiff filed a motion for a new trial.

On May 4, 1925, the court entered the following order on said motion:

Order

It is ordered by the court this 4th day of May, 1925, that the plaintiff's motion for a new trial be and the same is overuled.

[fol. 25] VIII. PETITION FOR APPEAL—Filed May 7, 1925

From the judgment entered February 9, 1925, in favor of the defendant in which the court sustained the demurrer and dismissed the petition, and from which judgment the court, on May 4, 1925, overruled the plaintiff's motion for a new trial, the plaintiff on May 7, 1925, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Respectfully submitted, Walter Carroll Low, Attorney of Record for Plaintiff.

IX. Order Allowing Appeal

It is ordered by the court this 11th day of May, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 26] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the proceedings after entry of judgment; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 12th day of May, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,245. Court of Claims. Term No. 522. William C. Atwater & Company, Incorporated, vs. The United States. Filed June 2, 1925. File No. 31,245.